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THREE YEARS AFTER SWANCC: STILL WADING THROUGH THE JURISDICTIONAL GAP CREATED BY THE UNITED STATES SUPREME COURT

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

Gretchen Zmitrovich

I. INTRODUCTION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,[1] [hereinafter the *SWANCC* case or *SWANCC* decision] the United States Supreme Court held that the United States Army Corps of Engineers' [hereinafter the Corps] rule extending the definition of "navigable waters" under the Clean Water Act[2] [hereinafter the CWA] to include intrastate waters used as a habitat by migratory birds exceeded the authority granted to the Corps under the CWA.

The purpose of this casenote is to examine the Supreme Court's opinion, its implications on wetlands regulation, the response of the states to the decision, and the need for the remainder of the states, including Mississippi, to enact state statutes to provide protection for isolated, nonnavigable wetlands. Part II of this casenote examines the underlying facts of the *SWANCC* case. Part III provides a brief history of the CWA, the Corps' jurisdiction over wetlands pursuant to the CWA, and the Supreme Court's decisions interpreting the extent of Congress's power under the Commerce Clause. Part IV details the holdings of both the majority and dissenting opinions in the *SWANCC* decision. Part V analyzes the impact of the decision on isolated, nonnavigable waters with a discussion of the status of wetland protection at the state level and the need for states to take immediate action in enacting their own statutes to protect these vulnerable wetlands.

II. FACTS

The Solid Waste Agency of Northern Cook County [hereinafter SWANCC] is a consortium of twenty-three suburban Chicago cities and villages, which selected a 533-acre parcel of land as a disposal site for baled nonhazardous solid waste.[3] Since being abandoned around 1960, part of the site, which had been previously used as a sand and gravel pit, had developed into a forest with remnant excavation trenches that had evolved into permanent and seasonal ponds.[4]

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1. 531 U.S. 159 (2001).
2. 33 U.S.C. §§ 1251-1387 (2000).
3. *SWANCC*, 531 U.S. at 162-63; *see also* Timothy S. Bishop et al., *One for the Birds: The Corps of Engineers' "Migratory Bird Rule," at* http://www.appellate.net/articles/migrabirdrule.pdf (last visited Mar. 26, 2004).
4. *SWANCC*, 531 U.S. at 162-63.

These ponds were of varying sizes (ranging from under one-tenth of an acre to several acres) and varying depths (ranging from several inches to several feet).[5]

SWANCC obtained the necessary permits from both Cook County and the State of Illinois, and because SWANCC's plans called for filling in some of the ponds, it contacted the Corps to determine if a federal landfill permit was required under section 404(a) of the CWA.[6] Initially, the Corps concluded that it lacked jurisdiction over the proposed disposal site "because it contained no 'wetlands,' or areas which support 'vegetation typically adapted for life in saturated soil conditions.'"[7] However, after being informed by the Illinois Nature Preserves Commission that a number of migratory bird species had been seen at the proposed site, the Corps reconsidered its previous jurisdictional decision.[8] The Corps found that approximately 121 bird species had been observed at the proposed site and asserted jurisdiction over the site pursuant to the "Migratory Bird Rule."[9] The Corps determined that the ponds were "waters of the United States" because "'(1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [sic] which cross state lines.'"[10]

SWANCC made several proposals to mitigate any negative effects of the likely displacement of the migratory birds.[11] SWANCC's proposals received the necessary local and state approval, but the Corps refused to issue a section 404(a) permit.[12] The Corps determined that SWANCC

> had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an "unacceptable risk to the public's drinking water supply"; and that the impact of the project upon area-sensitive species was "unmitigatable since a landfill surface cannot be redeveloped into a forested habitat."[13]

SWANCC filed suit in the United States District Court for the Northern District of Illinois challenging the Corps' jurisdiction over the proposed site and the merits of the Corps' denial of the section 404(a) permit.[14] The district court granted summary judgment to the Corps on the jurisdictional issue.[15] After drop-

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5. *Id.*
6. *Id.* Section 404(a) is codified at 33 U.S.C. § 1344(a) (2000).
7. *Id.* at 164 (quoting 33 C.F.R. § 328.3(b) (1999)).
8. *Id.*
9. *Id.*
10. *SWANCC*, 531 U.S. at 164-65 (quoting U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6).
11. *Id.* at 165.
12. *Id.*
13. *Id.* (quoting U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 87.).
14. *Id.*
15. *Id.*

ping its challenge on the merits of the denial, SWANCC appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit.[16] On appeal, SWANCC had two arguments: (1) the Corps had exceeded its authority under the CWA by asserting jurisdiction over "nonnavigable, isolated, intrastate waters based upon the presence of migratory birds" and (2) in the alternative, Congress lacked power under the Commerce Clause of the United States Constitution to grant the Corps such jurisdiction.[17]

The Seventh Circuit affirmed the district court's ruling.[18] The court held that Congress did have power to grant such jurisdiction to the Corps based upon the "cumulative impact doctrine."[19] The court noted that the "cumulative impact doctrine" applies when "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce."[20] The aggregate effect of SWANCC's filling of the ponds at the proposed site and its "'destruction of the natural habitat of migratory birds,'" according to the court, "was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds."[21] The court also held that the Corps' "Migratory Bird Rule" was a "reasonable interpretation of the [CWA]" because "the CWA reaches as many waters as the Commerce Clause allows."[22]

The United States Supreme Court granted certiorari on both issues: may the provisions of section 404(a) be extended to the ponds at the proposed site, and if so, can Congress grant jurisdiction to the Corps over these ponds consistent with the Commerce Clause.[23] The Court held that section 404(a) cannot be extended to the ponds at the proposed site and therefore did not answer the constitutional question.[24]

III. BACKGROUND AND HISTORY OF THE LAW

A. The CWA and the Corps' Jurisdiction over Navigable Waters

1. Creation of the CWA

In 1948, Congress enacted the Federal Water Pollution Control Act to "enhance the quality and value of our water resources and to establish a national policy for the prevention, control and abatement of water pollution."[25] After its

16. *SWANCC*, 531 U.S. at 165.
17. *Id.* at 165-66.
18. *Id.* at 166.
19. *Id.* (quoting Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845, 850 (7th Cir. 1999)).
20. *Id.*
21. *Id.*
22. *SWANCC*, 531 U.S. at 166 (quoting *SWANCC*, 191 F.3d at 851-52).
23. *Id.* at 162.
24. *Id.*
25. U.S. EPA, *The Challenge of the Environment: A Primer on EPA's Statutory Authority, at* http://www.epa.gov/history1/topics/fwpca/05.htm (last updated June 11, 2002) (internal quotations omitted).

enactment, the Federal Water Pollution Control Act went through several amendments, each expanding federal authority.[26] During this time, the federal authority for implementing the Federal Water Pollution Control Act went through several reorganizations and restructurings. The result was a "hodge-podge of law" that was difficult to implement.[27] Thus, Congress enacted amendments entitled the "Federal Water Pollution Control Act Amendments of 1972."[28] The Federal Water Pollution Control Act Amendments of 1972 put the sole authority for water pollution control in the Administrator of the EPA.[29]

The stated purpose of the Federal Water Pollution Control Act Amendments of 1972 was to restore and maintain chemical, physical, and biological integrity of the Nation's waters.[30] On December 15, 1977, Congress passed amendments to the Federal Water Pollution Control Act entitled "The Clean Water Act"; thereafter, the Federal Water Pollution Control Act and its numerous amendments became known as the CWA.[31] Under the CWA, the Administrator of the EPA and the Secretary of the Army, through the Chief Engineers of the Army Corps of Engineers, have joint responsibility for issuing and enforcing permits for the dredging and/or filling of "navigable waters."[32]

2. The Corps' Authority under Section 404(a)

Section 404(a) of the CWA grants the Corps the authority to issue permits for discharges of "dredged or fill material into the navigable waters."[33] The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[34]

When the Federal Water Pollution Control Act Amendments of 1972 were enacted, the Corps construed the term "navigable waters" literally, and a permit was only required for dredge and fill operations that took place in waters that were actually navigable.[35] Then on July 25, 1975, the Corps issued interim regulations to expand the definition of "navigable waters" to "include not only actually navigable waters, but also tributaries of navigable waters, interstate waters and their tributaries, and even nonnavigable waters (in the traditional sense) provided their use or misuse could affect interstate commerce."[36] In those interim regulations, the Corps included freshwater wetlands adjacent to other covered waters within its jurisdiction.[37]

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. 33 U.S.C. § 1251(a) (2000).
31. Elizabeth Ann Glass Geltman, *Regulation of Non-adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615, 622 (1989).
32. 33 U.S.C. § 1342, 1344 (2000).
33. *Id.* at § 1344(a).
34. *Id.* at § 1362(7).
35. Geltman, *supra* note 31, at 621.
36. *Id.* (citing 40 Fed. Reg. 31,320-21 (1975)).
37. Geltman, *supra* note 31, at 621-22. The Corps' regulations currently define the term "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

On July 19, 1977, the Corps issued its final regulations of "navigable waters."[38] The Corps redefined "wetlands" to include "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[39] The regulations further stated that "[w]etlands generally include swamps, marshes, bogs and similar areas."[40] The result of these regulations was that the Corps' jurisdiction was expanded; to be within the Corps' jurisdiction, wetlands no longer had to be periodically inundated or freshwater wetlands.[41]

In *United States v. Riverside Bayview Homes, Inc.*,[42] the United States Supreme Court was asked to determine a similar issue as in the *SWANCC* case. In *Riverside Bayview Homes*, the issue was whether the CWA and regulations issued by the Corps in 1977 extended the Corps' jurisdiction to wetlands (not "navigable waters" in themselves) adjacent to navigable bodies of water and their tributaries.[43] Riverside Bayview Homes, Inc. owned eighty acres of low-lying marshy land near the shores of a lake in Michigan.[44] In preparation for construction of a housing development, Riverside Bayview Homes, Inc. began to fill part of the marshy land.[45] The Corps asserted jurisdiction over these marshy lands as "adjacent wetlands."[46] The Corps filed suit against Riverside Bayview Homes, Inc. to enjoin them from filling in the marshy lands without first obtaining a permit.[47] The United States District Court for the Eastern District of Michigan granted the injunction, and on appeal, the United States Court of Appeals for the Sixth Circuit reversed holding that the Corps' regulations did not cover "wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation."[48]

The Supreme Court reversed holding that the marshy lands were covered by the Corps' jurisdiction.[49] The Court determined that the marshy lands were "wetlands" pursuant to the Corps' definition because they did contain vegetation that grows in saturated soils, the soils were saturated by ground water, and the plain language of the regulations required inundation by flooding *or* saturation by ground water.[50] The Court also determined that the marshy lands were adjacent to a body of navigable water.[51]

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38. Geltman, *supra* note 31, at 622.
39. *Id.*
40. *Id.*
41. *Id.*
42. 474 U.S. 121 (1985).
43. *Id.* at 123.
44. *Id.* at 124.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Riverside Bayview Homes*, 474 U.S. at 125.
49. *Id.* at 131.
50. *Id.* at 129-31.
51. *Id.* at 131.

The Court further held that the Corps' jurisdiction over adjacent wetlands as "waters of the United States" was a reasonable construction of section 404(a) of the CWA.[52] The Court determined that the fact that the marshy lands were not in themselves navigable did not render the Corps' jurisdiction void for two reasons. First, the Court noted that the term "navigable" was of "limited import," because Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[53] Second, the Court noted that the goal of the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and focused on the Corps' technical expertise in determining that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality."[54] In further support of the Corps' authority under section 404(a) to regulate the marshy lands, the Court noted that Congress acquiesced in the Corps' definition of "waters of the United States" when it refused to adopt legislation that narrowed the definition.[55]

Although the Court did find that the Corps had jurisdiction over nonnavigable wetlands adjacent to navigable bodies of water, the Court did not "express any opinion" on whether the Corps could "regulate discharges of fill material into wetlands that are not adjacent to bodies of open water."[56]

3. The Migratory Bird Rule

The Corps issued what is commonly referred to as the Migratory Bird Rule in the preamble of its 1986 regulations "in an attempt to 'clarify' the reach of its jurisdiction."[57] By issuing the Migratory Bird Rule, the Corps attempted to extend its jurisdiction over "navigable waters" to any waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treatises; or
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
> c. Which are or would be used as habitat for endangered species; or
> d. Used to irrigate crops sold in interstate commerce.[58]

Thus, under the Migratory Bird Rule, the Corps' authority under section 404(a) extended to "nonnavigable, [hydrologically] isolated, intrastate waters."[59]

In *Hoffman Homes, Inc. v. Administrator, United States EPA.*,[60] the United States Court of Appeals for the Seventh Circuit was asked to determine the validity of the Migratory Bird Rule as an exercise of the Corps' authority in reg-

52. *Id.*
53. *Id.* at 133 (citing S. CONF. REP. NO. 92-1236, p. 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776).
54. *Riverside Bayview Homes*, 474 U.S. at 132, 133.
55. *Id.* at 135-39.
56. *Id.* at 131, n.8.
57. *SWANCC*, 531 U.S. at 164 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
58. 51 Fed. Reg. 41,217 (1986).
59. *SWANCC*, 531 U.S. at 166.
60. 999 F.2d 256 (7th Cir. 1993).

ulating the "waters of the United States." The court was confronted with whether the Corps had jurisdiction over an area of property, "Area A," owned by Hoffman Homes, Inc. that covered approximately one acre and had been filled by Hoffman Homes, Inc. The Corps noticed the filling and issued a cease and desist order for Area A.[61] Hoffman Homes, Inc. applied for an after-the-fact permit, but the EPA, exercising its joint authority under the CWA, objected to Hoffman Homes, Inc.'s plans to mitigate the damage caused by the filling of Area A.[62] The EPA assessed a fine against Hoffman Homes, Inc. for the filling of Area A without a permit.[63] In assessing the fine, the EPA's Chief Judicial Officer found that while there was no direct evidence Area A had been used by migratory birds, the EPA had adequately demonstrated that "Area A provided 'a suitable habitat for migratory birds before it was filled in.'"[64]

On appeal, the Seventh Circuit held that the EPA had not presented sufficient evidence that migratory birds actually used Area A which would have allowed the Corps to assert jurisdiction over the property based on the Migratory Bird Rule.[65] However, the court did uphold the validity of the Migratory Bird Rule by agreeing with the EPA that "it is reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce."[66] The court further held, "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds."[67]

Prior to the time of the *SWANCC* decision, only one other federal court of appeals had upheld the Migratory Bird Rule as a valid exercise of Corps authority.[68] The United States Court of Appeals for the Ninth Circuit, in *Leslie Salt Co. v. United States*,[69] was confronted with a case involving a 153-acre piece of undeveloped land owned by Leslie Salt. Leslie Salt's predecessor had excavated pits on the property to deposit calcium chloride and for use in crystallizing salt.[70] The use of the pits ended in 1959, but the pits remained and developed into a winter and spring habitat for migratory birds.[71] In 1985, Leslie Salt began digging a ditch and pond on the land to drain it. The Corps became aware of this activity and issued a cease and desist order pursuant to section 404.[72]

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61. *Id.* at 258.
62. *Id.*
63. *Id.*
64. *Id.* at 259 (quoting EPA's Final Decision at 2).
65. *Id.* at 262.
66. *Hoffman Homes Inc.*, 999 F.2d at 261.
67. *Id.*
68. Bishop et al., *supra* note 3, at 10,633.
69. 896 F.2d 354 (9th Cir. 1990).
70. *Id.* at 355.
71. *Id.* at 355-56.
72. *Id.* at 356.

Leslie Salt filed suit. The United States District Court of the Northern District of California held that the Corps did not have jurisdiction over the property, and the United States appealed to the Ninth Circuit.[73] The Ninth Circuit held that the "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[74] The court then remanded to the district court to determine if the property met "the requisite connections to interstate commerce."[75] On remand, the district court found that the property was subject to the Corps' jurisdiction.[76] Cargill, Inc., the successor to Leslie Salt, appealed the district court's decision to the Ninth Circuit.[77] While noting that "[t]he migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason," the Ninth Circuit upheld the district court's decision.[78]

Cargill, Inc. appealed the Ninth Circuit's decision to the Supreme Court, and the Court denied certiorari on October 30, 1995.[79] In a dissenting opinion to the denial of certiorari, Justice Thomas noted that "the Corps' regulations are based on the assumption, improper in my opinion, that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds."[80] Justice Thomas also noted that "the Corps' expansive interpretation of its regulatory powers under the Clean Water Act . . . likely stretches Congress' Commerce Clause powers beyond the breaking point."[81]

B. The Commerce Clause and Recent Judicial Limitations on Its Use

Article 1, Section 8 of the United States Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[82] The United States Supreme Court first defined the nature of Congress's power under the Commerce Clause by defining "commerce" expansively in *Gibbons v. Ogden* as something more than just traffic; "it is intercourse."[83] The Court did hold, however, that Congress's power under the Commerce Clause was not unlimited; as comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one.[84] However, for nearly a century after *Gibbons*, the Court

73. *Id.*
74. *Id.* at 360.
75. *Leslie Salt Co.*, 896 F.2d at 360.
76. Leslie Salt Co. v. United States, 820 F. Supp. 478, 480 (N.D. Cal. 1992) (referring to the evidence found in the United States Memorandum on Remand). *See* Leslie Salt Co. v. United States, 55 F.3d 1388, 1392 (9th Cir. 1995) (noting that the "Memorandum states that some 55 species of migratory birds use the seasonally ponded areas as habitat").
77. *Leslie Salt Co.*, 55 F.3d at 1390.
78. *Id.* at 1396.
79. Cargill, Inc. v. United States, 516 U.S. 955 (1995).
80. *Id.* at 958 (Thomas, J., dissenting).
81. *Id.*
82. U. S. CONST. art. I, § 8, cl. 3.
83. 22 U.S. 1, 189-90 (1824).
84. *Id.* at 194-195.

rejected the reasoning in *Gibbons*, narrowly defined Congress's authority under the Commerce Clause, and found that it did not apply to the internal commerce of the states.[85] Then beginning in 1937 with the Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*,[86] the Court began to expand Congress's authority under the Commerce Clause.[87]

However, in *United States v. Lopez*,[88] for the first time in decades, the United States Supreme Court held that a congressional act was invalid as exceeding the scope of the Commerce Clause. For approximately sixty years prior to *Lopez*, the Court had upheld congressional acts if the activity regulated by the act had "substantial effects" on commerce, even if the effects were indirect.[89] In *Lopez*, the Court struck down a law regulating the possession of guns near school zones.[90] The Court held that Congress may regulate three categories of activities under its commerce power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce," and (3) "those activities that substantially affect interstate commerce."[91] Under this framework, the Court held that the gun law could not be upheld or struck down based on either of the first two categories.[92]

For the analysis under the third category, the Court separated activities into two groups: economic activities and noneconomic activities.[93] The Court held "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[94] In striking down the gun law, the Court further held that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[95] The Court also discussed the lack of legislative findings of the effect of the legislation on interstate commerce.[96] The Court noted that while ordinarily Congress need not make such findings, such findings may have helped the Court "evaluate the legislative judgment that the activity in question substantially affected interstate commerce."[97]

Five years later, the Supreme Court addressed another Commerce Clause challenge in *United States v. Morrison*.[98] In 1994, Congress passed the Violence

85. United States v. Lopez, 514 U.S. 549, 555 (1995).

86. 301 U.S. 1 (1937).

87. *See also* United States v. Darby, 312 U.S. 100, 118 (1941) (holding "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end."); Wickard v. Filburn, 317 U.S. 111, 127 (1942) (holding "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, *taken together with that of many others similarly situated*, is far from trivial.") (emphasis added).

88. *Lopez*, 514 U.S. 549.

89. *Id.* at 560.

90. *Id.* at 551.

91. *Id.* at 558-59.

92. *Id.* at 559.

93. *Id.* at 560-61.

94. *Lopez*, 514 U.S. at 560.

95. *Id.* at 567.

96. *Id.* at 563.

97. *Id.*

98. 529 U.S. 598 (2000).

Against Women Act, which provided a civil remedy to victims of gender-motivated violence.[99] The Court held that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[100] Unlike the gun control legislation at issue in *Lopez*, the Violence Against Women Act contained "numerous findings" of a connection between violence against women and interstate commerce.[101] However, the Court refused to hold these findings conclusive on whether the activity substantially affects interstate commerce and held "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[102] The Court struck down the Act as exceeding Congress's authority under the Commerce Clause and held "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[103]

IV. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*

A. The Majority Opinion

1. The Meaning of Section 404(a)'s "Navigable Waters"

Chief Justice Rehnquist delivered the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. The majority first turned to the Court's opinion in *Riverside Bayview Homes*.[104] While observing that the Court in *Riverside Bayview Homes* did find that the Corps had jurisdiction over some waters that were not navigable but were adjacent to navigable waters, the Court noted, "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[105] The Court declined to conclude that the plain language of the CWA gave the Corps jurisdiction over ponds not adjacent to open water.[106]

Next, the Court turned to the legislative history of the section 404(a).[107] The Court noted that the Corps' original interpretation of their authority under section 404(a), two years after its enactment, was inconsistent with its position in the present case.[108] As noted by the Court, the Corps' original regulations in 1974 defined "navigable waters" as those "subject to the ebb and flow of the tide" and/or those that can be used for "interstate or foreign commerce."[109]

99. *Id.* at 605.
100. *Id.* at 613.
101. *Id.* at 614.
102. *Id.* (internal citations omitted).
103. *Id.* at 617.
104. *SWANCC*, 531 U.S. at 167.
105. *Id.* at 167.
106. *Id.*
107. *Id.* at 168.
108. *Id.*
109. *Id.* (quoting 33 C.F.R. § 209.120(d)(1)).

Rejecting the contention by the Corps that Congress intended "that the term navigable waters be given the broadest possible constitutional interpretation," the Court found that there was nothing in the legislative history to indicate "that Congress intended to exert anything more than its commerce power over navigation."[110]

2. Congress's Acquiescence to the Corps' Interpretation of Section 404(a)

The Corps asserted that even if Congress did not intend to give it authority over nonnavigable waters that are not adjacent to covered bodies in 1972 when it passed the Federal Water Pollution Control Act, it "approved the more expansive definition of 'navigable waters' found in the Corps' 1977 regulations."[111] The Corps argued that when Congress considered the 1977 amendments to the CWA, it knew of the Corps' 1977 regulations in which "waters of the United States" was defined to include among other things "isolated wetlands and lakes."[112] In particular, the Corps pointed to two legislative actions: a failed House bill that limited "navigable waters" to only those that could be used "to transport interstate or foreign commerce"[113] and an extension of the EPA's jurisdiction under section 404(g) to "waters 'other than' traditional 'navigable waters.'"[114]

The Court dismissed the Corps' assertions regarding the failed House bill as evidence of congressional acquiescence, explaining that "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others."[115] The Court noted that the attenuation between the actions or inactions of the Congress passing the 1977 amendments and the intent of the Congress originally passing the CWA was considerable.[116] In addition, the Court concluded that the legislative history did not show "that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction."[117]

The Court also dismissed the Corps' argument concerning section 404(g)(1) as indicating that Congress acquiesced to the Corps' jurisdiction over SWANCC's ponds because section 404(g)(1) does not conclusively dictate the meaning of the term "waters" in other parts of the CWA.[118] In addressing its statement in *Riverside Bayview Homes* that the term "navigable" was of limited import, the Court noted that "it is one thing to give a word limited effect and quite another to give it no effect whatever."[119] Thus, the Court declined the

110. *SWANCC*, 531 U.S. at 168 n.3 (quoting S. CONF. REP. NO. 92-1236, p. 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3822 (internal quotations omitted)).
111. *Id.* at 168.
112. *Id.* at 168-69.
113. *Id.* at 169 (quoting 123 CONG. REC. 10420, 10434 (1977)).
114. *Id.* (quoting 33 U.S.C. § 1344(g)(1)).
115. *Id.* at 170.
116. *SWANCC*, 531 U.S. at 170.
117. *Id.* at 171.
118. *Id.*
119. *Id.* at 176.

Corps' "invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds."[120]

3. The Chevron/Federalism Argument

The Corps' final argument was that since Congress did not address the question of whether section 404(a) extended the Corps' jurisdiction to "nonnavigable, isolated, intrastate waters, and that, therefore, [the Court] should give deference to the 'Migratory Bird Rule.'"[121] The Court refused to defer to the Corps' interpretation because it found section 404(a) to be clear.[122] More importantly, the Court noted that even if section 404(a) was not clear, it would not defer to the Corps' interpretation.[123]

In not deferring, the Court held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[124] The Court's requirement of such an indication "stems from [its] prudential desire not to needlessly reach constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[125] The Court also noted that the concern about Congress's intent "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[126]

The Corps argued that the Migratory Bird Rule is "within Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce" because millions of people spend large sums of money on recreational activities related to migratory birds.[127] However, the Court recently, in *Lopez*[128] and *Morrison*,[129] has reaffirmed that Congress's authority under the Commerce Clause is not unlimited.[130] Thus, in order to determine if the grant of jurisdiction to the Corps under the Migratory Bird Rule to "nonnavigable, isolated, intrastate" waters exceeded Congress's authority, the Court would have to address "significant constitutional questions."[131]

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120. *Id.* at 171-72.

121. *Id.* at 172 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

122. *SWANCC*, 531 U.S. at 172.

123. *Id.*

124. *Id.* at 172-73 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

125. *Id.* at 173 (citing *Edward*, 485 U.S. 568).

126. *Id.* (citing United States v. Bass, 404 U.S. 336, 349 (1971)).

127. *Id.*

128. 514 U.S. 549.

129. 529 U.S. 598.

130. *SWANCC*, 531 U.S. at 173.

131. *Id.* at 174.

Although these significant constitutional questions are raised by the Corps' argument (thus, "invok[ing] the outer limits of Congress' power"), the Court could "find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit."[132] The Court noted that the Corps' interpretation "would result in a significant impingement of the States' traditional and primary power over land and water use" and thus alter "the federal-state framework" if the Corps was allowed to exercise federal jurisdiction over SWANCC's land.[133] Thus, the Court opted to "read the statute as written to avoid the significant constitutional and federalism questions raised by [the Corps'] interpretation, and therefore reject the request for administrative deference."[134]

B. Dissent's Opinion

1. The Meaning of Section 404(a)'s "Navigable Waters"

Justice Stevens delivered the dissenting opinion, joined by Justices Souter, Ginsburg and Breyer.[135] While rejecting that the term "navigable waters" in the CWA limited the Corps' jurisdiction to those waters that were indeed navigable, the dissent held that the term "operates in the statute as a shorthand for 'waters over which federal authority may properly be asserted.'"[136] In reaching this conclusion, the dissent discussed the history of federal water pollution control regulations, the definition of "navigable waters" in section 502(7) of the CWA, and the legislative history of the CWA, finding that in all three, the focus of the CWA is on clean water, not navigation.[137]

First, the dissent addressed the mission of the Corps under the CWA, which includes "protecting the quality of our Nation's waters for [a]esthetic, health, recreational, and environmental uses."[138] The dissent compared this mission with the narrower mission of the Corps under the Rivers and Harbors Appropriation Act of 1899 which was to "regulat[e] discharges into certain waters in order to protect their use as highways for transportation of interstate and foreign commerce."[139] The dissent also compared the CWA's purpose of being a "truly comprehensive federal water pollution legislation"[140] (and more specifically, section 404's purpose of being a "pollution control measure"[141]) to the Rivers and Harbors Appropriation Act's purpose of guaranteeing "the maintenance of navigability."[142] The dissent concluded that the scope of the Corps'

132. *Id.*
133. *Id.* (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")).
134. *Id.*
135. *Id.* at 174 (dissenting opinion).
136. *SWANCC*, 531 U.S. at 182.
137. *Id.* at 177-82.
138. *Id.* at 175.
139. *Id.*
140. *Id.* at 179.
141. *Id.*
142. *SWANCC*, 531 U.S. at 179.

jurisdiction under the Rivers and Harbors Appropriation Act logically was limited only to navigable waters.[143] However, since the Corps' mission under the CWA and the purpose of the CWA was broader and more comprehensive, the scope of its jurisdiction was broader and more comprehensive, extending to a definition of "waters of the United States"—a definition which does not require "actual or potential navigability."[144]

The dissent illustrated this shift from jurisdiction of navigable waters only to any "waters of the United States" by tracing the evolution of federal water pollution control regulations starting with efforts in the nineteenth century aimed at "'promot[ing] water transportation and commerce.'"[145] The dissent then outlined a string of federal regulations that focused on navigability including the various Rivers and Harbors Acts.[146] Next, the dissent noted "the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation" during the mid-twentieth century.[147] The dissent asserted that the passage of the CWA in 1972 was the climax of this shift.[148]

Second, the dissent held that while the CWA did use the term "navigable waters" from the Rivers and Harbors Acts and earlier versions of the Federal Water Pollution Control Act, the CWA broadened its definition to all "waters of the United States."[149] In particular, the word "navigable" was deleted from the definition of "navigable waters" found in the version of the CWA adopted by the House of Representatives.[150]

2. Congress's Acquiescence to the Corps' Interpretation of Section 404(a)

The dissent held that regulations promulgated after the passage of the CWA and the acquiescence of Congress in these regulations enlarged the Corps' jurisdiction.[151] The dissent focused on the 1975 regulations issued by the Corps that defined "the waters of the United States" to include "nonnavigable intrastate waters whose use or misuse could affect interstate commerce."[152] The Corps issued its final version of these regulations in 1977; under these regulations, the Corps' jurisdiction clearly covered "'isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.'"[153] The dissent noted the opposition to these regulations among members of Congress, which lead to a

143. *Id.* at 175.
144. *Id.*
145. *Id.* at 177 (quoting Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. REV. 873, 877 (1993)).
146. *Id.*
147. *Id.* at 178 (citing Kalen, *supra* note 145, at 877-89 n. 30).
148. *SWANCC*, 531 U.S. at 179.
149. *Id.* at 180.
150. *Id.* at 180-81 (citing H.R. 11896, 92d Cong. § 502(8) (1971)).
151. *Id.* at 183-91.
152. *Id.* at 184.
153. *Id.* (quoting 42 Fed. Reg. 37,127 (1977), as amended, 33 CFR § 328.3(a)(3) (1977)).

failed effort to limit the Corps' jurisdiction under section 404 to those "waters that are used, or by reasonable improvement could be used, as a means to transport interstate or foreign commerce and their adjacent wetlands."[154]

3. The Chevron/Federalism Argument

Finding that the Corps' interpretation did not "encroac[h] upon 'traditional state power' over land use, the dissent held that the Court should have given deference to the Corps under *Chevron*.[155] The dissent noted that the CWA was not a land-use code, but rather it was "a paradigm of environmental regulation" that is "an accepted exercise of federal power."[156] In support of its assertion that the CWA does not impinge upon state power, the dissent noted that while land use planning, a traditional state function, is used to dictate particular uses for land, environmental regulation "requires only that, however the land is used, damage to the environment is kept within prescribed limits."[157] The dissent found that the Corps' interpretation was "manifestly reasonable and therefore entitled to deference."[158]

V. Analysis

Although the Court invalidated the Migratory Bird Rule in *SWANCC*, it failed to define precisely what "waters" the Corps has the authority to regulate under section 404(a). Obviously from the decisions in *Riverview* and *SWANCC*, the Corps still has jurisdiction over "navigable waters" and wetlands "adjacent" to navigable waters.[159] The Corps may also still have jurisdiction over wetlands that have a "significant nexus" to "navigable waters."[160] If the dissent's interpretation of the Court's decision is correct, the Corps still has jurisdiction over "actually navigable waters, their tributaries, and wetlands adjacent to each."[161] However, the majority never specifically addressed the Corps' jurisdiction over tributaries of navigable waters or those wetlands adjacent to tributaries of navigable waters.

The ultimate effect of the Court's decision on isolated wetlands will mainly depend on future administrative and judicial definitions of "adjacent," "significant nexus," and possibly "tributaries." Based on some estimates, if the Corps only has jurisdiction over traditionally navigable waters and their immediately adjacent wetlands, then only 20% of the wetlands in the United States would be under federal regulation.[162] If a more inclusive definition of "adjacent" (such as

154. *SWANCC*, 531 U.S. at 185.
155. *Id.* at 191-92.
156. *Id.* at 191 (citing Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 282 (1981)).
157. *Id.*
158. *Id.* at 192.
159. *Riverside Bayview Homes*, 474 U.S. at 131; *SWANCC*, 531 U.S. at 167.
160. *SWANCC*, 531 U.S. at 167.
161. *Id.* at 177.
162. Jon Kusler, Association of State Wetland Managers, Inc., *The SWANCC Decision and State Regulation of Wetlands, available at* http://www.aswm.org/fwp/swancc/aswm-int.pdf (last visited Mar. 31, 2004).

the 100 year floodplain) is adopted by the Corps and upheld by subsequent court decisions, the total wetlands subject to federal regulation may range from 30% to 40% of the United States' total wetlands.[163] If the Corps' jurisdiction extended to both navigable waters (and their adjacent wetlands) and to the tributaries of navigable waters (and their adjacent wetlands), then between 40% and 60% of the United States' wetlands would be subject to federal regulation.[164] Of course, even the definition of "tributary" could be varying, so potentially more than 60% of the total wetlands could be under the Corps' jurisdiction.[165]

What is as equally clear as the Corps' ability to assert jurisdiction over traditionally navigable waters and their adjacent wetlands is that the Corps does *not* have jurisdiction over purely isolated wetlands based on the Migratory Bird Rule. Thus, protection of these previously federally protected isolated wetlands is now in the hands of the states. The impact of this loss of federal jurisdiction could potentially be devastating to some parts of the United States, particularly Mississippi. While the number of purely isolated wetlands found in the United States is impossible to calculate accurately, the United States Fish and Wildlife Service has assessed isolated wetlands in selected regions of the United States. The study area chosen for Mississippi was a 157,000-acre plot of land around Holly Springs, Mississippi.[166] Of the total acres in the plot, 6.5% are wetlands.[167] Of these wetlands, between 5.3% and 5.7% are isolated wetlands.[168] When assessing these numbers, it is important to realize that the Service surveyed one small area of Mississippi, and as some argue, "[e]ven if SWANCC results in only one percent loss of America's wetlands, the decision would cause more wetlands to be destroyed than were lost in the past decade."[169]

Do the states adequately protect these vulnerable wetlands? States can protect their wetlands using procedural mechanisms found in the CWA and/or by enacting state statutes. One of stated policies of Congress in enacting the CWA was "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[170] To further this policy, under section 401 of the CWA, a section 404 permit cannot be issued unless a section 401 water quality certification is obtained from or waived by the applica-

163. *Id.*

164. *Id.* This interpretation was advanced by the dissent in *SWANCC* and is the broadest interpretation.

165. *Id.*

166. R.W. Tiner et al., U.S. Department of the Interior, Fish and Wildlife Service, *Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States*, 177 *available at* http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm (June 2002).

167. *Id.*

168. *Id.* The Fish and Wildlife Service defines "isolated wetlands" as "wetlands with no apparent surface water connection to perennial rivers and streams, estuaries, or the ocean." *Id.* at 83.

169. Kusler, *supra* note 162; *see also* Mark Petrie et al., Ducks Unlimited, Inc., *The SWANCC Decision: Implication for Wetlands and Waterfowl*, 43 *available at* http://www.ducks.org/conservation/404_report.asp (Sept. 2001); U.S. EPA, *Status and Trends, at* http://www.epa.gov/OWOW/wetlands/vital/status.html (last updated Jan. 17, 2003) (noting in 1997, lower forty-eight states had 105.5 million acres of wetlands with 58,500 acres lost per year between the years of 1986 and 1997).

170. 33 U.S.C. § 1251(b).

ble state.[171] States can veto the issuance of the permit or add restrictions into the permit using this mechanism.[172] The majority of states use the section 401 certification requirement to regulate wetlands within their borders.[173] However, since the section 401 certification mechanism is directly tied to the section 404 permit, states using this mechanism do not provide adequate protection to isolated wetlands.

Only eighteen states currently provide extensive protection for isolated wetlands using state statutes:[174] Connecticut,[175] Florida,[176] Maine,[177] Maryland,[178] Massachusetts,[179] Michigan,[180] Minnesota,[181] New Hampshire,[182] New Jersey,[183]

171. 33 U.S.C. § 1341(a).

172. *Id.*

173. Kusler, *supra* note 162.

174. *See also* Association of State Wetland Managers, *State Wetland Programs: State Wetland Protection Statutes, at* http://www.aswm.org/swp/states.htm (last updated Mar. 24, 2003). Four of these states, Maine, New Jersey, Oregon, and Vermont, urged the Supreme Court to affirm the Seventh Circuit's decision despite having state statutes that provide extensive protection to isolated wetlands. *See* Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington as Amici Curiae in Support of Respondents at 21, 23-24, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (No. 99-11178) (noting that "federal wetlands regulation benefits the States and complements their own wetland protection programs" and "there is a compelling need for federal wetland regulation because of the regulatory void that would exist in its absence.")

175. Connecticut's "Inland Water Resources Program" is authorized by the Inland Wetlands and Watercourse Act and implemented by municipal wetlands agencies and the Connecticut Department of Environmental Protection. *See* CONN. GEN. STAT. § 22a-36 to -45 (1995); Connecticut Department of Environmental Protection, *Inland Water Resources Program–Fact Sheets and Information*, http://dep.state.ct.us/wtr/wetlands/inland.htm (last update Apr. 15, 1998).

176. Florida's "Environmental Resource Permitting Program" is authorized by statute and implemented by several water management districts and the Florida Department of Environmental Protection. *See* FLA. STAT. ch. 373.403-.443 (2000); Florida Department of Environmental Protection, *Submerged Land and Environmental Resources (SLER) Program*, http://www.dep.state.fl.us/water/wetlands/index.htm (last updated Aug. 21, 2003).

177. Maine's wetlands protection program is authorized by the Natural Resources Protection Act and implemented by the Maine Department of Environmental Protection. *See* ME. REV. STAT. ANN. tit. 38, §§ 480-A to 480-AA (2001); Maine Department of Environmental Protection, *Land & Water Quality—Natural Resources Protection Act*, http://www.state.me.us/dep/blwq/docstand/nrpapage.htm (last visited Mar. 31, 2004).

178. Maryland's "Wetlands and Waterways Program" is authorized by statute and implemented by the Maryland Department of the Environment. *See* MD. CODE ANN., ENVIR. §§ 5-901 to 5-911 (2002); Maryland Department of the Environment, *Wetlands and Waterways Program*, http://www.mde.state.md.us/Programs /WaterPrograms/Wetlands_Waterways/index.asp (last visited Mar. 31, 2004).

179. Massachusetts's "Wetlands Program" is authorized by the Wetlands Protection Act and the Inland and Coastal Wetlands Restriction Acts and implemented by the Massachusetts Department of Environmental Protection. *See* MASS. GEN. LAWS ch. 130 § 105 (2002); *Id.* at ch. 131, § 40; Massachusetts Department of Environmental Protection, *Wetlands*, http://www.state.ma.us/dep/brp/ww/rpwwhome.htm (last visited Mar. 31, 2004).

180. Michigan's wetlands protection program is authorized by the Natural Resources and Environmental Protection Act and implemented by the Michigan Department of Environmental Quality. *See* MICH. COMP. LAWS §§ 324.30301-.30323 (2003); Michigan Department of Environmental Quality, *Wetlands Protection*, http://www.michigan.gov/deq/0,1607,7-135-3313_3687---,00.html (last visited Mar. 31, 2004).

181. Minnesota's wetlands protection program is authorized by the Wetlands Conservation Act and implemented by the Minnesota Board of Water and Soil Resources. *See* MINN. STAT. §§ 103G.222-.2372 (2003); Minnesota Board of Water and Soil Resources, *Wetlands Conversation Act Manual, available at* http://www.bwsr.state.mn.us/wetlands/wcamanual/wcamanual02.pdf (Jan. 4, 2004).

182. New Hampshire's wetlands protection program is authorized by statute and implemented by the New Hampshire Department of Environmental Services. *See* N.H. REV. STAT. ANN. §§ 482-A:1 to 482-A:27 (2002); New Hampshire Department of Environmental Services, *Water Division Wetlands Bureau*, http://www.des.state.nh.us/wetlands/ (last updated Mar. 25, 2004).

183. New Jersey's "Freshwater Wetlands Program" is authorized by the Freshwater Wetlands Protection Act and implemented by the New Jersey Department of Environmental Protection. *See* N.J. STAT. ANN. §§ 13:9B-1 to 13:9B-30 (West 2003); New Jersey Department of Environmental Protection, *Land Use Regulation Program*, http://www.nj.gov/dep/landuse/ (last updated Feb. 19, 2004).

New York,[184] North Carolina,[185] Ohio,[186] Oregon,[187] Pennsylvania,[188] Rhode Island,[189] Vermont,[190] Virginia,[191] and Wisconsin.[192] The majority of these states provide protection through state statutes with implementation by a designated state agency. However, a few of these states provide protection through a cooperative of state and local agencies. While the details of each state's program are different, each uses a permitting process similar to that used under section 404(a). Thus, state and/or local approval is needed before commencement of prohibited operations, such as dredging or filling, in protected wetlands. Further, while some of the states provide comprehensive protection, a few have significant limitations (e.g., New York's regulations do not apply to wetlands under 12.4 acres, and Florida's regulations do not apply to wetlands located in

184. New York's wetlands protection program is authorized by the Freshwater Wetlands Act and implemented by the New York State Department of Environmental Conservation. *See* N.Y. ENVTL. CONSERV. LAW §§ 24-0101 to 24-1305 (McKinney 1997); New York State Department of Environmental Conservation, *A Brief Description of the Freshwater Wetlands Act and What It Means to Wetlands Landowners*, http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm (last revised June 17, 2003).

185. North Carolina's wetlands protection program is authorized by statute and implemented by the North Carolina Environmental Management Commission. *See* N.C. ADMIN. CODE tit. 15A, r. 2H.1301-.1305 (Oct. 2001); North Carolina Department of Environment and Natural Resources, WETLANDS/401 CERTIFICATION UNIT, http://h2o.enr.state.nc.us/ncwetlands/regcert.html (last visited Apr. 1, 2004).

186. Ohio's "Isolated Wetland Permit Program" is authorized by statute and implemented by the Ohio Environmental Protection Agency. Ohio was the second state, after Wisconsin, to enact regulation for the protection of isolated wetlands as a direct response to the *SWANCC* decision. *See* OH. REV. CODE ANN. §§ 6111.01-.42 (West 1995 & Supp. 2002); Ohio Environmental Protection Agency, *401 Certifications, Isolated Wetlands Permits*, http://www.epa.state.oh.us/dsw/401/401.html (last updated Mar. 25, 2004).

187. Oregon's "Wetlands Program" is authorized by the Wetlands Conservation Act and implemented by the Oregon Division of State Lands. *See* OR. REV. STAT. ANN. §§ 196.668-.770 (2001); Oregon Division of State Lands, *Wetlands Program*, http://statelands.dsl.state.or.us/wetlandsintro.htm (last modified Feb. 9, 2004).

188. Pennsylvania's wetlands protection program is authorized by the Dam Safety and Encroachments Act, the Clean Streams Law, and the Dam Safety and Waterway Management Rules and Regulations and implemented by the Pennsylvania Department of Environmental Protection. Recently, the state streamlined the permitting process by the enactment of the "State Programmatic General Permit." *See* 32 PA. CONS. STAT. ANN. §§ 693.1-.27 (West 1997); 35 PA. CONS. STAT. ANN. §§ 691.1-.8 (West 2003); 25 PA. CODE §§ 105.1-.452(2003); Pennsylvania Department of Environmental Protection, *Waterways, Wetlands, and Erosion Control*, http://www.dep.state.pa.us/dep/deputate/watermgt/wc/subjects/wwec/general/wetlands/wetlands.htm (last modified Oct. 17, 2003).

189. Rhode Island's "Freshwater Wetlands Program" is authorized by the Freshwater Wetlands Act and implemented by the Rhode Island Department of Environmental Management. *See* R.I. GEN. LAWS §§ 2-1-18 to 2-1-24 (2002); Rhode Island Department of Environmental Management, *Office of Water Resources–Freshwater Wetlands*, http://www.state.ri.us/dem/programs/benviron/water/permits/fresh/index.htm (last revised Mar. 17, 2004).

190. Vermont's wetlands protection program is authorized by the 1986 Act Relating to the Regulation of Wetlands and implemented by the Vermont Water Resources Board and the Vermont Department of Environmental Conservation. *See* VT. STAT. ANN. tit. 10, § 905(7) (2002); Vermont Department of Environmental Conservation, *Wetlands Section*, http://www.anr.state.vt.us/dec/waterq/wetlands.htm (last updated Jan. 2004); Water Resources Board, *Vermont Wetland Rules, available at* http://www.state.vt.us/wtrboard/wet/wetrule2002.pdf (Jan. 1, 2002).

191. Virginia's "Water Protection Permit Program" is authorized by the Water Protection Permit Program Regulation and implemented by the Virginia Department of Environmental Quality. *See* 9 VA. ADMIN. CODE §§ 25-210-10 to 25-210-260 (West 2001); Virginia Department of Environmental Quality, *Wetlands*, http://www.deq.state.va.us/wetlands/ (last updated Mar. 9, 2004).

192. Wisconsin's wetlands program is authorized by statute and implemented by the Wisconsin Department of Natural Resources. Wisconsin was the first state to enact regulation for the protection of isolated wetlands as a direct response to the *SWANCC* decision. *See* 2001 WISCONSIN ACT 6; WIS. STAT. § 281.36 (2001); Wisconsin Department of Natural Resources, *Wisconsin Wetlands*, http://www.dnr.state.wi.us/org/water/fhp/wetlands/index.shtml (last revised Apr. 16, 2003).

the Panhandle[193]).

Other states have taken action toward enacting statutes and/or revising regulations to protect isolated wetlands. Indiana has expanded its state National Pollution Discharge and Elimination System permit program to include isolated wetlands while it adopts new regulations.[194] In October of 2002, the Southern Environmental Law Center filed a petition with the state of South Carolina seeking to initiate rulemaking to protect South Carolina's isolated wetlands.[195] The South Carolina Department of Health and Environmental Control published a Notice of Rule Drafting on December 27, 2002, seeking to amend R. 61-101, Water Quality Certification.[196] The agency issued proposed rules in 2003.[197] After a public comment phase, the agency will review the proposed rules in 2004.[198]

The only protection afforded wetlands under Mississippi law is found in the Coastal Wetlands Protection Act.[199] The Coastal Wetlands Protection Act prohibits entities from engaging in a regulated activity that affects coastal wetlands without a permit.[200] Regulated activities include for example, dredging or filling coastal wetlands.[201] Isolated wetlands in the remainder of the State are specifically excluded from protection. The Mississippi Air and Water Pollution Control Law protects Mississippi's water from pollution.[202] However, wetlands that are "wholly landlocked and privately owned, and which are not regulated under the Federal Clean Water Act" are not covered in Mississippi's definition of "waters of the state."[203] Thus, while protecting isolated wetlands located in its coastal counties, Mississippi provides no protection for isolated wetlands in the remainder of the State, leaving a gap that must be filled in order to protect Mississippi's wetlands.

How can this gap be closed? A first step logically would involve the EPA and the Corps defining "adjacent," "significant nexus," and "tributary." In a joint memorandum dated January 15, 2003, the EPA and the Corps clarified their jurisdiction based on their reading of the *SWANCC* case and, at the same time, issued an advance notice of proposed rulemaking [hereinafter ANPRM].[204] The EPA and the Corps grouped "waters" into four groups: (1) isolated, intrastate waters that are nonnavigable; (2) traditional navigable waters; (3) adjacent wetlands (both those adjacent to traditional navigable waters and those adjacent to nonnavigable waters); and (4) tributaries.[205] The memorandum discussed the

193. Association of State Wetland Managers, *State Wetland Programs: State Wetland Protection Statutes*, http://www.aswm.org/swp/states.htm (last updated Mar. 24, 2003).

194. Indiana Department of Environmental Management, *NPDES Permit for Discharges of Dredged and Fill Material to Isolated Waters No Longer Subject to Federal Jurisdiction*, http://www.in.gov/idem/water/planbr/401/wnpdes.html (last updated May 15, 2003).

195. Southern Environmental Law Center, *South Carolina Wetlands Rules, at* http://www.selcga.org/Cases/sc_wetlands/SC_wetlands.shtml (last visited Apr. 1, 2004).

196. *Id.*

197. *Id.*

198. *Id.*

199. MISS. CODE ANN. §§ 49-27-1 to 49-27-71 (2002).

200. *Id.* § 49-27-9.

201. *Id.* § 49-27-5(c).

202. *Id.* §§ 49-17-1 to 49-17-43.

203. *Id.* § 49-17-5.

204. 68 Fed. Reg. 1991 (Jan. 15, 2003).

SWANCC decision, the EPA and the Corps' current regulations, and cases subsequent to the *SWANCC* decision that may impact their jurisdiction.[206] The conclusion of the agencies was that the agencies did not have CWA jurisdiction over isolated, intrastate waters that are nonnavigable where such jurisdiction is based on the Migratory Bird Rule.[207] The agencies also concluded that they still had jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, tributaries of navigable waters, and wetlands adjacent to tributaries of navigable waters.[208] The memorandum concluded by directing field staff to make "jurisdictional and permitting decisions on a case-by-case basis" taking into consideration the memorandum, the regulations, and "any additional relevant court decisions."[209]

In its ANPRM, the EPA and the Corps requested input on the appropriate definition of "waters of the United States" as well as implications of the *SWANCC* decision in order to develop proposed regulations that afford "full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA."[210] The public comment period on the ANPRM ended on April 16, 2003.[211] The EPA received more than 133,000 comments from citizens, organizations, and public entities.[212]

Unfortunately, on December 16, 2003, the EPA and the Corps announced that they would not issue these much anticipated revised regulations.[213] In the press release announcing their decision, the agencies promised to "continue [their] efforts to ensure that the Corps' regulatory program is an effective, efficient and responsive as it can be."[214] But, how effective, efficient, and responsive is a case-by-case determination made by field staff interpreting caselaw or by the agencies' headquarters using factors as vague as use of the waters by interstate travelers for recreation?[215] For now, the EPA and the Corps' definitions of "adjacent," "significant nexus," and "tributary" remain unknown, and the public is left with a costly system of challenging the Corps' decisions on a case-by-case

205. 68 Fed. Reg. at 1996-97.

206. *Id.* at 1995-98.

207. *Id.* at 1996. While admitting the two agencies no longer have any authority based on the Migratory Bird Rule, the memorandum directs the field staff of the two agencies to "seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters. . ." based on the other grounds listed in 33 C.F.R. § 328.3(a)(3)(i)-(iii). The "other grounds" include "use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce." *Id.*

208. *Id.* at 1998.

209. *Id.*

210. *Id.* at 1991.

211. The original comment period ended March 3, 2003. The EPA, however, extended the deadline. *See* U.S. EPA, *Clean Water Act Definition of "Waters of the United States,"* http://www.epa.gov/owow/wetlands/swanccnav.html (last updated Dec. 19, 2003).

212. *Id.*

213. U.S. EPA, *EPA National News: EPA and Army Corps Issue Wetlands Division, available at* http://yosemite.epa.gov/opa/admpress.nsf (Dec. 16, 2003).

214. *Id.*

215. *See supra* note 207.

basis to determine what is and what is not included under its jurisdiction.[216]

In the absence of revised regulations, another step to closing the gap left by the Supreme Court would be Congress amending the CWA specifically to include isolated wetlands under the Corps' jurisdiction. On February 27, 2003, bi-partisan bills which are intended to do just that were introduced in both houses.[217] The proposed act, the "Clean Water Authority Restoration Act of 2003," seeks to replace the term "navigable waters" with the term "waters of the United States," and the definition of "waters of the United States" includes wetlands in both bills.[218] However, even if Congress enacts this amendment to the CWA, the Clean Water Authority Restoration Act of 2003 would likely face constitutional challenges. Based on the current state of the law, to be upheld by a court, the Clean Water Authority Restoration Act of 2003 would have to establish a "significant nexus" between isolated, nonnavigable wetlands and traditional navigable waters as well as provide a clear delineation of federal and state power (so as not to encroach "upon a traditional state power"[219]). While the proposed amendments provide seventeen findings, the Supreme Court may still refuse to uphold the amendments based on *Lopez* and its progeny.

The better solution for Mississippi and the other thirty-one states without adequate protection for isolated wetlands would be to enact a statute to provide such protection. Of the eighteen states that currently have protection for isolated wetlands, two adopted their regulations in direct response to the *SWANCC* decision.[220] Based on the wetland statutes of Massachusetts, Connecticut, New York, Michigan, Maryland, Oregon, and other states, the Association of State Wetland Mangers, Inc. has developed a model statute.[221] The model statute details wetland mapping and delineation requirements, permitting procedures, and penalty and enforcement provisions. It also provides a definitional section and provides for mitigation bank provisions and real estate tax incentives. Inherent in the adoption of such a statute is the need for the state legislatures to provide additional funding for the state agencies charged with the permitting and enforcement activities. By enacting state laws to regulate and protect isolated wetlands, these

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216. A KeyCite search on Westlaw of the *SWANCC* decision restricted to dates of January 2001 to March 2004 revealed how ineffective, inefficient, and unresponsive such a case-by-case determination of the limits of the Corps' jurisdiction over isolated wetlands has been over the past three years: eleven federal courts of appeals decisions, twenty federal district court decisions, and two state court decisions have been handed down interpreting or discussing the case. *See also*, U.S. EPA, *Post-SWANCC Caselaw on "Waters of the United States," available at* http://www.epa.gov/owow/wetlands/Caselaw12303.pdf (last updated Jan. 21, 2003) (providing a list of the myriad of caselaw that was decided between the date of the SWANCC decision and January 2003). For an example of the magnitude of costs involved in such challanges by the public and private sectors, consider that the battle to decide whether the Corps had jurisdiction over SWANCC's wetlands took thirty million dollars in public money and thirteen years. Oral Argument, 2000 WL 1669870, (U.S. Oct. 31, 2000), Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

217. J.R. 962, 108th Cong. (2003); S. 473, 108th Cong. (2003). Similar bills were introduced during the 107th Congress but died in committee. *See* H.R. 5194, 107th Cong. (2002); S. 2780, 107th Cong. (2002).

218. H.R. 962; S. 473.

219. *SWANCC*, 531 U.S. at 175.

220. 68 Fed. Reg. at 1995; *see also supra* notes 183, 189.

221. Association of State Wetland Managers, Inc., *Model State Wetland Statute to Close the Gap Created by SWANCC, available at* http://www.aswm.org/swp/model-leg.pdf (Feb. 22, 2001).

states can ensure that their wetlands are protected now, before more wetlands are destroyed.

VI. CONCLUSION

As the legislature of Maine recognized in enacting its wetlands protection regulations, wetlands "have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical and environmental value of present and future benefit."[222] Wetlands are a vital resource to our world, and the *SWANCC* decision left a gap in the protection of this resource. While the size of the gap still remains unknown, what is known is that this Nation is losing wetlands every day that were formally provided protection under the CWA. Wetlands are so vital to this Nation's landscape and natural heritage that states cannot afford to wait for the federal government to act. States, including Mississippi, must act now in passing statutes to protect these isolated, nonnavigable wetlands that have fallen into the jurisdictional gap created by the Supreme Court.

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222. ME. REV. STAT. ANN. tit. 38, at § 480-A.